83-744

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

LEO FUENTES,
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Court of Appeals No. 56058

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STATEMENT OF QUESTIONS PRESENTED

I. Whether under a charge of filing a false claim under medicaid petitioner was deprived of due process when the trial court omitted to instruct the jury that an intent to deceive was an element of the crime.

II. Whether petitioner was deprived of due process when he was convicted of medicaid fraud when the prosecutor failed to adduce sufficient evidence to persuade any rational trier of fact that defendant was guilty beyond a reasonable doubt.

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AUTHORITIES CITED

JURISDICTION OF THE COURT

The Opinion of the Michigan Court of Appeals sought to be reviewed is dated July 19, 1982 and entered that date. It is reported in 118 Mich App 135 (1982).

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied by Order dated May 16, 1983. Petitioner's motion for reconsideration of that Order was denied by Order dated August 16, 1983.

Jurisdiction to review the Opinion of the Michigan Court of Appeals is conferred, it is believed, upon this Court by 28 USC 1254.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

Petitioner and the American Medical Centers of Michigan, Limited, a Michigan Corporation, Eugene Kraus, and Anton Zadurowych, M.D., were charged in a 35 count information with having filed false and fraudulent claims for medicaid compensation, the state claiming that the defendants made a claim to the Michigan Department of Social Services for a direct diagnostic laryngoscopy provided to a named certain patient knowing that a direct diagnostic paryngoscopy had not been provided and knowing that the claim was false.

The case was tried to a jury, and all defendants were convicted on numerous counts.

The American Medical Center, Ltd, was ordered to pay restitution of $44,000. The other defendant were placed on five years probation with provision that the last six months were to be spent in the county jail, and each was ordered to pay restitution in specific amounts.

Petitioner, convicted on four of the eight counts in which he was named, appealed his convictions as a matter of right to the Michigan Court of Appeals, and his convictions were affirmed by that Court. *People* v *American Medical Centers of Michigan, Limited,* 118 Mich App 123 (1982).

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied by that Court by Order dated May 16, 1983, and petitioner's motion for reconsideration of the Order of denial was denied by Order dated August 16, 1983.

STATEMENT OF PERTINENT FACTS

Each count of the 35 count information charged a single violation of *Michigan Compiled Laws Annotated* (MCLA) *400.607* which provides that a person shall not make or present or cause to be made or presented to an employee of the state a claim under *MCLA 400.1 et seq* [in this case medicaid] upon or against the state 'knowing the claim to be false, fictitious or fraudulent'.

Not all of the defendants were charged in every count. Kraus and the corporation were charged in each of the 35 counts. Petitioner was charged in counts 18 through 35, inclusive, a total of 8 counts.

In each count it was alleged that the defendants named in the count caused a claim to be made to the Michigan Department of Social Services for 'a direct diagnostic laryngoscopy' provided to a named certain Medicaid patient knowing that 'a direct diagnostic laryngoscopy' had not been so provided and 'knowing said claim to be false, fictitious and/or fraudulent'.

Evidence was adduced for the prosecution that a 'direct laryngoscopy' involves procedure wherein the examining physician views the patient's larynx directly whereas an 'indirect laryngoscopy' involves a procedure wherein the physician views the patient's larynx indirectly, *i.e.*, by means of a mirror attached to an instrument.

From the evidence adduced, it could be fairly concluded that each of the patient's involved in each count received the benefit of at least an indirect laryngoscopy. A direct laryngoscopy was a more complex procedure than was the indirect and was usually performed in a hospital environment.

There was testimony from prosecution witnesses that under the Medicaid program, an indirect laryngoscopy was part of the examination of the patient and was not billed separately. A Practitioner's Manual issued by the State set

forth for the physician the billing procedures and set forth the code numbers under which individual procedures were to be billed. The code number for 'direct laryngoscopy' was '2140' and on page 98 of the manual there is written after '2140' the word 'laryngoscopy' and then a comma and then the word 'direct' and then a comma and then the word 'diagnostic' (T708). A person with no medical background could read page 98 as meaning that there were two forms of laryngoscopy, one being direct and one being diagnostic (T709). Both an indirect and a direct laryngoscopy can be diagnostic procedures (T573).

The office girl testified that she did all of the billing for Medicaid. Kraus, who was not a physician, was president of American Medical Center, Ltd. Kraus told her how much to bill and he instructed her under each count to bill under '2140'. Kraus told her under which doctor to make the billing. The billings were signed by her for the doctors 'because they don't have time to go through 'em all' (T1237-1238). Under all of the counts under which petitioner was convicted, the laryngoscopy was conducted by a doctor other than petitioner; petitioner signed each patient's card as the reviewing physician; the purpose of petitioner's signing was to indicate that he had reviewed the file (T1253).

Petitioner did not testify, and he did not call any witnesses. The other defendants did not call any witnesses and did not themselves testify.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was prosecuted under the following statute, *MCLA 400.607:*

> 'A person shall not make or present or cause to be made or presented to an employee or officer of the state a claim under Act No. 280 of the Public Acts of 1939, as

amended, upon or against the state, knowing the claim to be false, fictitious, or fraudulent,'

'Knowing' was defined in *MCLA 400.602* [section 2 of the statute involved] as follows:

' "Knowing" and "knowingly" means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result'.

The four counts of the information under which petitioner was convicted were identically worded except for the names of the patients treated and the dates of treatment. As to the petitioner, the trial judge read Count XVIII of the information to the jury and indicted that the other counts charging petitioner read the same:

'Count XVIII reads as follows: Leo Fuentes, M.D., Eugene Kraus and the American Medical Centers of Michigan Limited, a Michigan corporation, Defendants herein, on or about January 19, 1979, in the City of Lansing, County of Ingham, State of Michigan, 'made and presented, or caused another to make and present an itemized claim to employees of the Michigan Department of Social Services, wherein payment was requested under the Michigan Medical Assistance Program (Medicaid) for a direct diagnostic laryngoscopy which was allegedly provided to Medicaid patient Sheila Jones on September 13, 1978, by Leo Fuentes, M.D., at the American Medical Centers of Michigan, Limited; Whereas, in truth and in fact, said Defendants well knew at all times that a direct diagnostic larygoscopy had not been provided to said patient at the American Centers of Michigan, Limited, by Leo Fuentes, M.D., or any other employee of the clinic; and said Defendants did thereby make and present, or cause another to make and present a claim under 1939 Public Act No. 280, as amended, upon or against the State of Michigan, knowing said claim to be false, fictitious and/or fraudulent in

its content, in violation of Michigan Compiled Laws Annotated 400.607.' (T1555-1556)

The theory of the prosecution was that at best an indirect laryngoscopy was performed and that a claim for a direct laryngoscopy was made, that the claim was false and that petitioner knew that the claim was false.

In sum, the evidence showed that under each of the four counts under which petitioner was convicted, an assistant physician performed an indirect laryngoscopy upon the patient named, the assistant physician wrote on the patient's chart 'laryngoscopy', the petitioner signed the patient's chart thereafter indicating he approved the procedure performed without petitioner's having seen the patient, a claim under the patient's name was prepared by a clerical person in the office in which it was indicated by word that a 'laryngoscopy' was performed, the claim was made under the code number '2140'. It was indicated that the procedure was done in the office and the claim was presented to an employee of the state.

The trial judge instructed the jury that the elements of the crime charged under the four counts under which petitioner was convicted were (1) 'a claim must have been made or presented to an employee or officer of the State under the Social Welfare Act', (2) 'that claim must have been false, fictitious or fraudulent', (3) 'the Defendant must have made or presented the claim or the Defendant must have caused the claim to be made or presented', and (4) 'the Defendant must have acted knowing the claim was false, fictitious or fraudulent' (T1560).

The trial judge instructed the jury on the meaning of the word 'knowing' as follows:

'What about the word "knowing?" (sic). Remember that one of the elements concerns the matter of knowing. You must be convinced beyond a reasonable doubt that,

when the Defendant caused a claim to be made or presented, he or she — he or it had knowledge that it was false, fictitious or fraudulent. Knowledge is an important element of this crime and knowledge not only means actual knowledge, but also it means constructive knowledge gained through notice of facts and circumstances from which guilty knowledge may be inferred. One may not deliberately close his, her or its eyes to what otherwise would have been obvious to him, her or it; however, an act is not done knowingly if it is done by mistake, by carelessness, with an honest belief that the claim was true or for other innocent reasons.' The statute, the law that 'I have earlier made reference to, defines the word "knowing" as follows: Knowing and knowingly means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result.' (T1564-1565)

Petitioner requested the trial judge to instruct the jury that they had to find proven beyond a reasonable doubt that the petitioner had a specific intent to defraud the state. The trial judge refused to so instruct the jury because he was of the view that 'knowing' did not mean 'intent'. The judge said 'I will not give an instruction on specific intent nor intent to injure or defraud, 13 and 14' (T1338).

The trial judge, by omitting to instruct the jury on the element of specific intent, effectively relieved the prosecution of its burden under the Due Process Clause of the *14th Amendment to the United States Constitution* to prove every fact necessary to constitute the crime charged beyond a reasonable doubt. *In re Winship*, 397 US 358 (1970).

The Michigan statute under which petitioner was prosecuted was quintessentially the same as *18 USC 1001* in that both are aimed at the making of false, fictitious and fraudulent statements which are meant to deceive.

In interpreting *18 USC 1001*, the Court in *United States* v *Lange*, 528 F2d 1280, 1288 (CA5 1976) held that an intent

to deceive was an element of the crime and that a *mens rea* had to be proven in a prosecution under the statute. Accord: *United States* v *Baker*, 626 F2d 512 (CA5, 1980); *United States* v *Lichenstein*, 610 F2d 1272 (CA5 1980).

In *United States* v *Behenna*, 552 F2d 573 (CA4 1977), the Court, in interpreting *18 USC §922(a)(6)* which forbids the making of a false statement in connection with the purchase of firearms, held that the word 'knowingly' implied *scienter*.

The Court in *United States* v *Bishop*, 412 US 346, 360-361 (1973) held that the word 'willfully' implied the element of *mens rea*.

In the case at bench, petitioner might have done all that the prosecution proved and yet might have done so without any intent to deceive or to defraud. To convict an accused of crime absent a criminal mind to accompany an erring hand is contrary to the basic tenets of our system of law. *Morisette* v *United States*, 342 US 246 (1952).

II.

The proofs adduced by the prosecution were insufficient to persuade any rational trier of the facts that every element of the crimes charged against petitioner were proven beyond a reasonable doubt. *In re Winship*, 397 US 358 (1970); *Jackson* v *Virginia*, 443 US 307 (1979).

At the conclusion of the prosecution's proofs, petitioner moved the trial court for a directed verdict of acquittal on all counts based upon the principle that the elements of the crimes charged had not been proven beyond a reasonable doubt. The trial court denied this motion.

The evidence adduced by the prosecution established under the four counts under which petitioner was convicted the following: in the office setting, an assistant physician examined the patient named and wrote on the patient's

chart 'laryngoscopy'; that at least an indirect laryngoscopy was performed; that the petitioner signed the patient's chart thereafter indicating that he approved the procedures performed without petitioner's having seen the patient or observing what procedure was performed; that a claim under the patient's name was prepared by a clerical person in the office in which it was indicated by word that a 'laryngoscopy' was performed and that it was performed in the office and the code number '2140' was used; and that this claim was presented to an employee of the state.

If there was a falsity or a fictitiousness or a fraudulent statement, it was to be found in the representations made on the claim form submitted to the state, *viz*, that the patient was seen, that a laryngoscopy was performed on the patient, that it was performed in the office, that the billing was being done under code number '2140'.

But there was no falsity or fictitiousness or fraudulent statement in any of the above. It was literally true that the patient named was seen, that a laryngoscopy was performed on the patient, that the laryngoscopy was performed in the office and that the claim was being made under the code provided in the manual.

The prosecution claimed that the making of a claim under code number '2140' is a statement that a direct laryngoscopy was performed and that such claim was a false statement because a direct laryngoscopy was not performed.

But the question is not the correctness or the reasonableness of the prosecution's interpretation of the use of code number '2140' to make the claim. The question is whether the use of code number '2140' was used with the intent to make a false statement.

The prosecution's expert witness admitted in his testimony that there was ambiguity in the language descriptive of the procedure designated under '2140', *viz*, 'larynogo-

scopy, direct, diagnostic', since an indirect laryngoscopy is a diagnostic procedure as is a direct laryngoscopy (T573).

Convictions for making false statements cannot be predicated upon an ambiguity where the challenged statement may be literally correct. See *United States* v *Lattimore*, 127 F Supp 405 (USDC DC 1955), aff'd in *per curiam* opinion by equally divided court 232 F2d 334; *United States* v *Lattimore*, 215 F2d 847 (CADC 1954); *United States* v *Vesaas*, 586 F2d 101 (CA8 1978)

The test for determining falsity of a statement under the perjury statute and under the false statement statutes is the same. *United States* v *Clifford*, 426 F Supp 696 (USDC ED NY 1976); *United States* v *Diogo*, 320 F2d 898 (CA2, 1963).

When the accused's statement is literally true, he cannot be convicted of perjury. *Bronston* v *United States*, 409 US 352 (1973). Nor can an accused be convicted under a false statement statute if his statement is literally true. *United States* v *Diogo, supra; United States* v *Clifford, supra.*

Thus, there was insufficient evidence adduced by the prosecution to persuade any rational trier of the facts beyond a reasonable doubt of each and every elements of the crimes charged against petitioner.

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important questions of federal constitutional law that should be settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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Detroit, Michigan
October 13, 1983

APPENDIX

Opinion of the Michigan Court of Appeals
Sought to be Reviewed

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

Nos. 55368, 56058, 56349

AMERICAN MEDICAL CENTERS OF MICHIGAN, LIMITED, a Michigan corporation, EUGENE KRAUS, LEO FUENTES, M.D., and ANTON ZADUROWYCZ, M.D.,
Defendants-Appellants,

and

FELMA FUENTES, M.D.,
Defendant.

Before: M.J. Kelly, P.J., and Cynar and G.R. Cook*, JJ.

M. J. Kelly, P.J.

Defendants-appellants were convicted by a jury of numerous counts of medicaid fraud, MCL 400.607; MSA 16.614(7). Defendants, Leo Fuentes, Anton Zadurawycz, and Eugene Kraus were sentenced to five years probation with the last six months to be spent in the county jail. Additionally, they were ordered to pay restitution in the amounts of $40,000, $60,000 and $200,000 respectively. Defendant American Medical Center, Ltd., (American) was ordered to pay restitution of $44,000. Defendants appeal as of right, GCR 1963, 806.1.

American operated two clinics, the Pasadena Street Clinic and the American Medical Center Clinic, in Flint, Michigan. Mr. Kraus, who is not a physician, was president of the corporation. Dr. Zadurowycz supervised the operation of the American Medical Center Clinic while Dr. Leo Fuentes and his wife, Dr. Felma Fuentes, supervised the Pasadena Street Clinic.

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* Circuit Judge, sitting on the Court of Appeals by assignment.

Dr. Zadurowycz and Drs. Fuentes provided services for Medicaid patients. To receive compensation for these services, American would submit a claims form furnished by the Department of Social Services (DSS). The forms, which were processed by computers, used code numbers to identify patients, diagnoses, and treatments. DSS provided a manual containing code numbers for different services including "Laryngoscopy, direct, diagnostic" which was listed under the respiratory subsection of surgery.

During 1978 and 1979, the Attorney General conducted an investigation of defendants after receiving a complaint alleging Medicaid fraud. This investigation resulted in a 35 count complaint and warrant in Ingham County Circuit Court against the defendants. The complaint alleged that the defendants had submitted claims for direct diagnostic laryngoscopies which were never performed. Prior to the preliminary exam, defendants moved to change venue to Genesee County, but their motion was denied. Also, defendant Felma Fuentes had been confined to bed and had not been arraigned so the proceedings continued without her.

A preliminary examination was commenced on November 20, 1979. During the examination, the Attorney General produced evidence showing that the procedures for a *direct* laryngoscopy were different than those used for an *indirect* laryngoscopy. A laryngoscopy is the visual examination of the exterior and interior of the larynx. In an indirect laryngoscopy, an instrument containing a mirror is inserted into the patient's mouth and angled to reflect down the patient's throat. A light is then reflected off the mirror and an image of the vocal cords is reflected back to the mirror. A direct laryngoscopy, on the other hand, uses an instrument known as a laryngoscope which is inserted down the patient's throat while he is under anesthesia and in a supine position. The laryngoscope allows the doctor to get a direct view of the larynx. Medicaid would reimburse a

doctor an additional $67 for a direct laryngoscopy while no provision was made for any additional reimbursement for an indirect laryngoscopy. Evidence was also presented demonstrating that between January 1, 1978 and June 6, 1979, 5,135 of the 7,941 direct laryngoscopies performed for Medicaid patients in this state were done at American's clinics. The Attorney General also produced evidence that patients at American Clinics were not given direct laryngoscopies but that American nevertheless submitted claims for direct laryngoscopies for those patients. On March 24, 1980, the examining magistrate bound defendants over for trial.

Prior to trial, all defendants moved for separate trials and defendants Fuentes and Zadurowycz moved *in limine*, to prevent the prosecution from introducing at trial evidence of state-wide claims for laryngoscopies as compared to claims made by American. The defendants also moved to quash the information. Initially, the trial court granted severance but on reconsideration, it ordered a joint trial of all defendants. The court further denied defendants' requests to quash the information and denied the motion *in limine*.

The trial began on October 27, 1980 and the prosecutor presented evidence similar to that presented during the preliminary examination. However, the trial court did not allow the prosecution to introduce evidence comparing claims for laryngoscopy by American Clinics as opposed to those made state-wide. After the prosecution's case-in-chief, all defendants moved for directed verdicts which were denied by the trial court. The defendants rested without presenting any evidence and the jury was instructed. The jury returned a verdict finding defendants Zadurowycz, Kraus and American guilty as charged and defendant Fuentes guilty of four of the eight counts charged against him.

Opinion of the Michigan Court of Appeals Sought to be Reviewed

The trial court sentenced the individual defendants to five years probation with the last six months to be spent in the county jail. All defendants were ordered to pay restitution. Defendants appeal raising a number of issues.

I.

Defendant Leo Fuentes argues that the examining magistrate erred when he found probable cause to bind him over. The standard for reviewing an examining magistrate's decision to bind over a defendant was recently stated in *People* v *Goode*, 106 Mich App 129, 136; 308 NW2d 448 (1981), where the court wrote:

> "An examining magistrate is to bind a defendant over for trial if it appears that a crime has been committed and that there is probable cause to believe that the defendant committed it. MCL 766.13; MSA 28.931, *People* v *Asta*, 337 Mich 490, 609-610; 60 NW2d 472 (1953). While positive proof of guilt is not required, there must be evidence on each element of the crime charged or evidence from which those elements may be inferred. *People* v *Oster*, 67 Mich App 490, 495; 241 NW2d 260 (1976), *lv den* 397 Mich 848 (1976). Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged. *People* v *Dellabonda*, 265 Mich 486, 490; 251 NW 594 (1933). A magistrate's determination at the preliminary examination should not be disturbed unless a clear abuse of discretion is demonstrated. *People* v *Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979)."

Fuentes was charged with eight counts of Medicaid fraud. MCL 400.607; MSA 16.614(7) reads in pertinent part as follows:

> "(1) A person shall not make or present or cause to be made or presented to an employee or officer of the

> state a claim under Act No. 280 of the Public Acts of 1939, [MCL 400.1 *et seq;* MSA 16.401 *et seq*] as amended, upon or against the state, knowing the claim to be false, fictitious, or fradulent."

The elements of the offense under MCL 400.607; MSA 16.614(7) are 1) a person makes, presents or causes to be made or presented, 2) to an employee or officer of the state, 3) a claim under the Social Welfare Act, MCL 400.1 *et seq;* MSA 16.401 *et seq.* and 4) knowing the claim to be false, fictitious, or fraudulent.

During the preliminary examination, evidence was presented that Fuentes, along with his wife, supervised the operation of the Pasadena Street Clinic. His provider number on the billing form had been used to bill Medicaid for direct laryngoscopies. The patients' charts for those billings also contained a notation that laryngoscopies had been performed upon those patients. The prosecution also presented evidence that the patients were not given direct laryngoscopies but rather indirect laryngoscopies. Finally, the evidence showed that the average physician would know the difference between a direct and an indirect laryngoscopy. After reviewing the evidence presented during the preliminary exam, we cannot say that the examining magistrate abused his discretion when he bound over defendant Leo Fuentes.

II.

Defendant Anton Zadurowycz argues that the trial court erred when it denied his motion for a severance of trial. According to Zadurowycz, he intended to present a defense which was antagonistic to the other defendants. He also argued that the joint trial restricted his right to cross-examine prosecution witnesses because of the different defenses presented by the defendants.

Defendants do not have an absolute right to a separate trial; rather there is a strong policy favoring joint trials. *People* v *Carroll*, 396 Mich 408; 414; 240 NW2d 722 (1976). When moving for severance, the defendant must clearly, affirmatively and fully show that his "substantial rights" will be prejudiced by joint trial. *Id.* 414, *People* v *Jeffrey Kramer*, 103 Mich App 747, 753; 303 NW2d 880 (1981). Where defendants separate defenses are antagonistic, severance should be granted. *People* v *Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976), *Krammer*, *supra*, 753. A conclusory statement of antagonistic defenses must be supported by an affidavit defining the inconsistencies between the defenses. *People* v *Larry Krammer*, 108 Mich App 240, 256; 310 NW2d 347 (1976). Where a defendant fails to show prejudice to his substantial rights, the competing interest of benefit to the courts, the public, and the administration of justice from joinder comes into play. *People* v *Clark*, 85 Mich App 96, 101; 270 NW2d 717 (1978). Finally, we will not reverse a trial court's decision concerning joint trials unless there has been an abuse of discretion by the trial court. MCL 768.5; MSA 28.1028, *Carroll*, *supra*, 414.

In this case, Zadurowycz submitted an affidavit in support of his motion for severance. The affidavit states that Zadurowycz was never involved in the billing procedure. However, the affidavit fails to state how the other defendants' defenses are antagonistic to his defense. In fact, Zadurowycz's affidavit fails to support the allegation that the defenses are antagonistic. Furthermore, defendant's claim that Kraus and American were the guilty parties is not an antagonistic or inconsistent defense but merely a different one. *Carroll*, *supra*, 414. Defendant has failed to demonstrate that his substantial rights were prejudiced by a joint trial and we cannot say that the trial court abused its discretion when it refused to grant defendant's motion for severance.

III.

Defendant Zadurowycz also alleges that the trial court erred when it established a peremptory challenge rotation procedure for jury selection which differed from GCR 1963, 511.5. Prior to trial, the parties agreed to a peremptory challenge rotation which went from the prosecution to defendant Zadurowycz, to defendant Fuentes, to defendant Kraus, then to defendant American before returning to the prosecutor. On the third day of jury selection, after Zadurowycz and Fuentes had used their last peremptory challenge, Fuentes objected to the procedure. Zadurowycz joined in the objection. Defendants argued that the rotation should have gone from the prosecutor to one of the defendants and then back to the prosecutor before going to another defendant. At the time of defendants' motions, the prosecutor had 13 challenges left. The trial court denied defendants' motion.

Initially we note that defendant did not make a timely objection to the jury selection method. The method used for peremptory challenges was agreed upon by the parties and no objection was made until the third day of jury selection. This was not a timely objection. See *People* v *Miller*, 411 Mich 321, 326; NW2d (1981).

Furthermore, the procedure used did not violate GCR 1963, 511.5. The rule reads in part:

> "Peremptory challenges. After all challenges for cause are completed, the parties shall make or waive their peremptory challenges. First the plaintiff and then the defendant may exercise 1 or more peremptory challenges alternatively until each party successively waives further peremptory challenges or all such challenges have been exercised."

In *People* v *Finney*, Mich App ; NW2d (Docket #78-4046, rel'd 3-2-82), this Court found that a

similar peremptory challenge order did not violate GCR 1963, 511.5. In *Finney*, the prosecutor exercised his peremptory challenge followed by defendant #1, defendant #2 and defendant #3 before the prosecution would again be required to use a challenge. Thereafter, the order rotated by round: Defendant #1, defendant #2, defendant #3, and the prosecutor; defendant #2, defendant #3, the prosecutor, defendant #1, etc. On appeal, Finney made a claim identical to defendant's. This Court rejected Finney's argument stating:

> "Defendant has no grounds for complaint. If he chooses to exercise all of his peremptory challenges before the prosecutor has exercised his, he takes the chance that the prosecutor will subsequently exercise the remaining peremptories in a manner unsatisfactory to defendant. See *People* v *Mullane*, 256 Mich 54, 57; 239 NW 282 (1931).
>
> "GCR 1963, 511.5 affords to the prosecutor fifteen peremptories under the circumstances of this case. The court rule does not require that the prosecutor exercise his peremptories in the manner suggested by defendant. Cases cited by defendant do not apply as they do not involve multiple defendants. *People* v *Thomas*, 25 Mich App 213; 181 NW2d 328 (1970), *People* v *Parham*, 28 Mich App 267; 184 NW2d 273 (1970). In those cases the defendants were required to exercise all their peremptory challenges before the prosecution was required to exercise any. In the case at bar, the trial judge required all parties to take turns and no one was required to exercise any peremptory challenges at any time. Defendant could have saved all of his peremptory challenges until everyone else had exercised all of theirs." *Id.*

Because defendant failed to make a timely objection and because the procedure used did not violate GCR 1963, 511.5, we find no error.

IV.

At the close of the prosecution's proofs, all the defendants moved for directed verdicts. The trial court denied the motions. After the jury returned a guilty verdict against each defendant, Fuentes moved for judgment notwithstanding the verdict or in the alternative a new trial. This motion was also denied. The defendants appeal claiming the trial court erred when it refused to direct a verdict in their favor. Fuentes also argues that insufficient evidence was presented at trial to convict him of Medicaid fraud.

When reviewing a trial court's ruling on a motion for a directed verdict, we must consider the evidence presented by the prosecution up to the time the motion is made, view that evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People* v *Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), *cert den* 449 US 885 (1980). This same standard applies when determining whether sufficient evidence to convict a defendant has been presented. *People* v *Delongchamps*, 103 Mich App 151, 159; 302 NW2d 626 (1981), *lv den* 412 Mich 857 (1981).

As discussed previously, the elements of the offense under MCL 400.607; MSA 16.614(7) are 1) a person makes, presents, or causes to be made or presented, 2) to an employee or officer of the state, 3) a claim under the Social Welfare Act, 4) knowing the claim to be false, fictitious, or fraudulent.

Initially, defendant Zadurowycz argues that the trial court erroneously applied the "any evidence" standard which was disapproved of in *Hampton*, *supra*. When ruling on defendant's motion for a directed verdict, the trial judge stated the "any evidence test." It then stated the proper test as established by *Hampton*. The prosecutor informed

the trial court that *Hampton* applied and the trial court acknowledged that this was the standard it used in ruling on defendant's motion. Therefore, defendant's claim lacks merit.

At the time defendants Fuentes and Zadurowycz made their motion for a directed verdict, the prosecution had presented evidence that they were the supervising physicians at the Pasadena Street and American Medical Center Clinics. Their initials were on patients' charts which meant that they had reviewed the information contained in the chart. Each chart indicated that a "laryngoscopy" had been performed, but the patients testified that their examination did not include a laryngoscopy. The evidence also demonstrated that if a laryngoscopy was performed, it was an indirect laryngoscopy which was not a billable procedure under the Medicaid Code. Furthermore, the evidence showed that a doctor would know the difference between a direct and indirect laryngoscopy and that direct laryngoscopies were not performed in an office or clinic but in a hospital. The prosecutor also presented evidence that claims for direct laryngoscopies containing Funtes' and Zadurowycz's provider numbers, were submitted to the DSS. While their signatures were affixed to the claims form by the corporation billing clerk, the policy manual allows the authorized representative of the provider to sign the claims form. However, the provider remains responsible for the accuracy of the information.

After reviewing the evidence presented by the prosecutor, we find that a reasonable trier of fact could have found beyond a reasonable doubt that defendants were guilty. The trial court did not err when it denied defendants' motions for directed verdicts and there was sufficient evidence to convict defendant Fuentes.

Defendants Kraus and American also argue that the trial court erred when it denied their motions for directed ver-

dicts. The evidence presented against the other defendants was also applicable to these defendants. While patients' charts indicated that a laryngoscopy had been performed, the patients testified that this examination had not been given. The evidence established that Kraus was responsible for billing and informed the billing clerk which procedures to bill for and the amount to bill. Defendant Kraus received the Medicaid payments from the state at a post office box over which he had control. Kraus was the person who instructed the billing clerk to bill for direct laryngoscopies and informed her that it was a procedure which would be done to each patient. He also suggested to a number of physicians' assistants at the two clinics that more laryngoscopies be performed and provided them with a larynx vue, which could not be used to perform a direct laryngoscopy. Finally, Kraus instructed the billing clerk to dispose of the billing forms which she had at her house when the police executed a search warrant on the corporation.

A rational trier of fact could have found beyond a reasonable doubt that Kraus had committed the offense. Since defendant American is liable for the fraudulent conduct of its president and other agents, undertaken within the scope of their authority, the trial court properly denied both Kraus's and American's motions for a directed verdict. *Attorney General ex rel James* v *National Cash Register Co*, 182 Mich 99, 111-112; 148 NW2d 420 (1914).

V.

The defendants raise a number of objections to the jury instructions given by the trial court. A defendant has a right to have a properly instructed jury pass upon the evidence. *People* v *Lewis*, 91 Mich App 542, 544-545; 283 NW2d 790 (1979). The instructions to the jury must include all the elements of the crime charged and must not exclude mate-

rial issues, defenses or theories if there is evidence to support them. *People* v *Allensworth*, 401 Mich 67, 70; 257 NW2d 81 (1977), *cert den* 435 US 933 (1978), *People* v *Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975), *cert den* 422 US 1044, 1048 (1975). When reviewing jury instructions, they must be reviewed in their entirety. *People* v *Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981). Where the instructions include a reading of the information and the applicable statutes, they will generally be found to be sufficiently comprehensive. *People* v *McGee*, 67 Mich App 12, 16; 239 NW2d 741 (1976), *lv den* 396 Mich 861 (1976), *People* v *Browning*, 106 Mich App 516, 528; 308 NW2d 264 (1981).

While discussing the proposed instructions, all the defendants objected to the prosecution's proposed intent instruction. Fuentes requested that the jury be given an instruction on specific intent, CJI 3:1:16, while the other defendants requested that the jury be read the definition of "knowing" as contained in MCL 400.602(c); MSA 16.614(2)(c). The trial court refused to give an instruction on specific intent but did read the jury the statutory definition of "knowing".

On appeal, defendant Zadurowycz argues that the trial court should have given the jury an instruction which included the statutory definition of "false statement" and "false representation" as contained in MCL 400.602(b); MSA 16.614(2)(b). However, defendants were charged under MCL 400.607; MSA 16.614(7) which does not necessarily require proof that defendant made a false statement or false representation. It requires that defendants make a claim which is false, fictitious or fraudulent. Therefore, the trial court did not err when it did not give the requested statutory definition.

Nor are we convinced after reading the instructions in their entirety that the instructions allowed the jury to convict defendant for a "simple mistake". The trial judge stated that "an act is not done knowingly if it is done by mistake * * *". His remaining instruction regarding knowledge prevented the jury from convicting defendants for merely making a mistake.

Defendant Fuentes argues that crimes of Medicaid fraud under MCL 400.607; MSA 16.614(7) contain an element of specific intent. He claims that the trial court erred when it refused to give an instruction on specific intent. Specific intent is a nebulous concept but has been defined as the subjective desire or knowledge that the prohibited result will occur. *People* v *Spry*, 74 Mich App 584, 596; 254 NW2d 782 (1977), *lv den* 401 Mich 825 (1977). To determine if a criminal statute requires specific intent, we look to the mental state set forth in the statute. *People* v *Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976), *lv den* 396 Mich 848 (1976). Where a stature requires that the criminal act be committed either "purposefully" or "knowingly" then the crime is a specific intent crime. *Id.* 569.

In this case, MCL 400.607; MSA 16.614(7) contains a requirement that defendant knowingly submit a false, fictitious, or fraudulent claim. Since it requires a mental state of "knowingly", it is a specific intent crime. However, we do not find that the trial court's refusal to instruct the jury on specific intent requires the reversal of Fuentes' conviction. The trial court explained to the jury that the prosecution had to show that defendant knowingly submitted a false claim. It also read the jury the statutory definition of "knowingly" which required the jury to find that defendant was aware of his conduct and that his conduct was substantially certain to cause the intended result. When read as a whole, the jury instructions adequately informed the jury of

the intent necessary to convict defendant. Consequently, no reversible error occurred.

All the defendants objected to the prosecution's proposed instruction regarding constructive knowledge. When giving the jury instructions, the trial court stated that knowledge meant not only actual knowledge, but also constructive knowledge. The judge went on to explain that mere mistake was not enough and read the jury the statutory definition of knowledge. On appeal, defendants argue that the judge erred when he instructed the jury that constructive knowledge was sufficient to convict defendants.

Intent and knowledge can be inferred from one's actions and when knowledge is an element of an offense, it includes both actual and constructive knowledge. *People* v *Tantenella*, 212 Mich 614, 621; 180 NW 474 (1920), *People* v *Starks*, 107 Mich App 377, 385; 309 NW2d 556 (1981). The trial court did not err when it instructed the jury concerning the knowledge required before defendants could be found guilty.

Defendant Fuentes also argues that the trial court's instruction concerning the requirement that defendant "caused" a fradudlent claim to be made was erroneous. Defendant failed to object to this instruction and has waived appellate review absent manifest injustice. *People* v *Hogan*, 105 Mich App 473, 484-485; 307 NW2d 72 (1981). A review of the instruction given by the trial court convinces us that no injustice occurred.

We reject defendant Zadurowycz's claim of error as to the court's instruction concerning venue and the reading of the parties' stipulation on venue for the same reason. After the court finished instructing the jury, defendant failed to object to these instructions. Subsequently, after the jury began its deliberations, he objected to the instruction. Failure to object to an instruction prior to a jury retiring to

consider its verdict waives appellate review of the instruction. *People* v *Smith*, 80 Mich App 106, 113; 263 NW2d 306 (1977), *lv den* 406 Mich 920 (1979). In any event the proper venue for an action brought in connection with Medicaid fraud is the Ingham County Circuit Court. MCL 400.611; MSA 16.614(11). Therefore, the jury was properly instructed even had defendant's equivocation resulted in a timely objection.

The final challenge to the jury instruction involves the trial court's instruction on corporate liability. The trial judge instructed the jury that a corporation is criminally liable for the acts of its agents and employees undertaken within the scope of their employment. He further instructed the jury that corporate knowledge depended upon the combined knowledge of its employees and agents. On appeal, defendant argues that the instruction on combined knowledge was erroneous since a corporation can only be liable for acts performed by its board, officers or supervisors.

"Person" as defined by MCL 600.602(e); MSA 16.614(2)(e), includes a corporation. It is well settled that a corporation is liable for the fraudulent conduct of its president where the conduct was within the scope of his authority. *National Cash Register, supra*, 111-112. Some courts have recognized that a corporation is considered to have acquired the collective knowledge of its employees. *United States* v *T.I.M.E.-D.C. Inc*, 381 F. Supp 730, 738 (1974).

In this case, we cannot say that the jury instructions were erroneous. The only way a corporation can act is through its employees and agents. The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent acts. Furthermore, even applying the test urged by defendant American, it would be liable for the conduct of Kraus, American's president, under whose authority the fraudulent billings issued and his knowledge would have made American liable for the acts.

After a review of the jury instructions as a whole, we cannot say that the trial court erred when it instructed the jury.

VI.

Defendants Kraus and American argue that certain conduct by the prosecution during trial acted to deny them a fair trial. Initially, they argue that the prosecutor appealed to the jurors' pocketbook during opening argument when he stated that Medicaid was funded by his and the jurors' tax money. While the type of argument is improper, where it occurs in opening argument, is isolated in character, and could have been cured by instructions, the error is harmless. *People* v *Lemanski*, 87 Mich App 88, 90; 273 NW2d 598 (1978).

Defendants also object to statements made by the prosecutor during closing arguments. The prosecutor's closing argument contained a statement that Leo Fuentes' signature appeared as the treating physician on some patients' charts while his wife's provider number appeared on the Medicaid claim for that patient's treatment. He argued that this in itself was a false claim. Defendants' attorney moved for a mistrial arguing that the comments were outside the scope of the information. The trial court denied defendants' motion but did read a curative instruction to the jury and later repeated it during the jury instructions. The declaration of a mistrial rests in the sound discretion of the trial judge and absent an affirmative showing of prejudice to the rights of defendant, a denial of the motion will not be reversed. *People* v *Kramer*, 103 Mich App 747, 757; 303 NW2d 880 (1981). In this case, defendants' rights were not prejudiced since the trial court twice instructed the jury that it was not to consider a claim to be fraudulently submitted just because the treating physician's provider number did not appear on the claim form.

Defendants also argue that the prosecution's theory of the case erroneously summarized the testimony of the billing clerk. During her testimony, the billing clerk stated that Kraus told her to "dispose" of the billing records she had at home. In the prosecutor's theory of the case, the testimony was summarized as Kraus ordering the clerk to "destroy" the records. Kraus objected and moved for a mistrial. After review of the testimony, it was discovered that Kraus used the work "dispose" rather than "destroy", and the trial court gave the jury a curative instruction informing them that Kraus used the term dispose not destroy. Again the defendant has failed to demonstrate that his rights were prejudiced where the trial court gave a proper curative instruction. Therefore the denial of his motion for mistrial was not erroneous.

Finally, defendants claim prejudice resulted when the prosecutor questioned one of American's physician's assistants about dispensing drugs. Again, when defendants objected to the testimony, the trial court sustained the objection and gave curative instructions. We find no merit in defendants' claims that they were denied a fair trial. *People* v *Thorngate*, 10 Mich App 317, 323; 159 NW2d 373 (1968).

VII.

Finally, defendant Fuentes argues that the trial court's imposition of $40,000 in restitution as a condition of probation was unconstitutional.

Before addressing this issue, we must comment on the trial court's sentencing procedure. After informing defendants that they would be required to pay restitution, the judge extracted a promise from each defendant that defendants would not appeal any error allegedly committed in sentencing. Const 1963, Art I § 20 gives an accused the right to appeal his conviction and sentence. While constitu-

tional rights may be waived, Michigan Courts have refused to allow agreements which waive a defendant's constitutional right to appeal. See *People* v *Harrison*, 386 Mich 269, 275; 191 NW2d 371 (1971), *People* v *Butler*, 43 Mich App 270, 281; 204 NW2d 325 (1972). Such agreements would effectively insulate the decisions of trial courts from appellate review. A trial court may not require that a defendant waive his right to appeal sentencing errors.

Turning to the merits of defendant Fuentes' claim, he argues that the record does not support a finding that he may be liable for $40,000 in restitution. A criminal defendant, who has been placed on probation, may be required to pay restitution. MCL 769.3; MSA 28.1075; MCL 771.3(3); MSA 28.1133(3). Restitution has been upheld as a condition of probation in welfare fraud cases. *People* v *Neil*, 99 Mich App 677, 679; 299 NW2d 23 (1980). Therefore, the trial court could impose restitution upon defendant as part of his sentence for violating the Medicaid False Claim Act, MCL 400.601 *et seq*; MSA 16.614(1) *et seq*.

Restitution is designed to compensate the injured victim, and, as a condition of probation, the amount and manner of payment is a matter for the judgment of the sentencing judge. *Neil*, *supra*, 680. However, a prerequisite to adequate appellate review of restitution mandates a disclosure of the purpose of the payment and the manner in which the amount of restitution has been determined. *People* v *Heil*, 79 Mich App 739, 748; 262 NW2d 895 (1975). Furthermore, there must be persuasive support in the record for the sentencing judge's conclusion that the losses for which restitution is ordered were caused by the criminal conduct of the defendant. *People* v *Pettit*, 88 Mich App 203, 207; 276 NW2d 878 (1979), *lv den* 406 Mich 987 (1979).

In this case, the sentencing judge did not state on the record how he determined the amount of restitution owed.

However, an examination of the record, including the preliminary examination, convinces us that defendant Fuentes has not been harmed by the sentencing court's determination. During the preliminary examination, evidence was introduced that American's Clinics claimed 5,135 direct laryngoscopies. Fuentes' provider number appeared upon 973 of the claims. American was reimbursed $67 for each direct laryngescopy and a total of $63,251 for those claimed by Fuentes. The sentencing court required Fuentes to pay $40,000 in restitution. While the sentencing court should have been more explicit in its findings, any error which occurred inured to defendant Fuentes' benefit.

VIII.

Because of our disposition on defendants' appeals, we do not address the prosecution's cross-appeal. We affirm defendants' convictions.

Affirmed.

Order of the Michigan Supreme Court
Denying Leave to Appeal

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 16th day of May in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

69856

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

AMERICAN MEDICAL CENTERS OF MICHIGAN, LIMITED, et al.,
Defendants-Appellees,

and

LEO FUENTES,
Defendant-Appellant.

SC: 69856
COA: 56058
LC: 80-30385-FY

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing

is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 16th day of May in the year of our Lord one thousand nine hundred and eighty-three.

[SEAL]

(s) Corbin R. Davis
Clerk

Order of the Michigan Supreme Court
Denying Reconsideration of Order
Denying Leave to Appeal

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 16th day of August in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

69856
(36)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

AMERICAN MEDICAL CENTERS OF MICHIGAN, LIMITED, et al.,
Defendants-Appellees,

and

LEO FUENTES,
Defendant-Appellant.

SC: 69856
CoA: 56058
LC: 80-30385-FY

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of May 16, 1983, is considered, and the motion is DENIED, because it does not appear that said order was entered erroneously.

0811

Order of the Michigan Supreme Court
Denying Reconsideration of Order
Denying Leave to Appeal

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 16th day of August in the year of our Lord one thousand nine hundred and eighty-three.

(s) Corbin R. Davis
Clerk

No. 83-744

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

LEO FUENTES
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS

I. Where Petitioner was charged with a "knowing" presentation of false medicaid claims and the Michigan trial court gave an instruction on the element of "knowledge" which included reading to the jury the statutory definition of the word "knowing" but declined to give an instruction on specific intent to deceive, were the instructions constitutionally adequate to inform the jury of the mental state required for conviction under Michigan law?

II. Was sufficient evidence adduced for a rational trier of fact to find that the essential elements of the crime charged were proven beyond a reasonable doubt?

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No. 83-744

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

LEO FUENTES
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION OF THE COURT

Page 1 of the Petition states that jurisdiction is conferred upon the Court in this case by 28 USC § 1254. That statement is erroneous. If jurisdiction exists in this case, it must be conferred by 28 USC § 1257(3).

STATUTORY PROVISIONS INVOLVED

Michigan Medicaid False Claim Act, § 2(c), MCL 400.602(c); MSA 16.614(2)(c):

> " 'Knowing' and 'knowingly' means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result."

Michigan Medicaid False Claim Act, § 7, MCL 400.607; MSA § 16.614(7):

"(1) A person shall not make or present or cause to be made or presented to an employee or officer of the state a claim under Act No. 280 of the Public Acts of 1939, as amended, upon or against the state, knowing the claim to be false, fictitious, or fraudulent.

"(2) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $50,000.00, or both."

COUNTERSTATEMENT OF THE CASE

On October 17, 1979, a 35-count, criminal complaint naming as co-defendants American Medical Centers of Michigan Ltd., a Michigan corporation (hereinafter called "American"), Eugene Kraus, Felma Fuentes, M.D., Leo Fuentes, M.D., and Anton Zadurowycz, M.D., was filed in District Court 54A. The following day the Petitioner, Leo Fuentes, M.D., was arrested and arraigned.

The Petitioner was charged only in Counts XVIII through XXV inclusive of the complaint and was examined thereon in District Court 54A. On March 26, 1980, a return was filed in Ingham County Circuit Court binding the Petitioner over for trial as charged. An Information was filed April 11, 1980, and on May 26, 1980, the Petitioner filed a written waiver of arraignment and stood mute.

The trial commenced on October 27, 1980, (Tr 2) the jury was sworn on October 30, 1980, (Tr 502-503) and the trial ended on November 13, 1980, with verdicts, regarding the Petitioner of guilty on Counts XVIII, XX, XXIII, and XXV and not guilty on Counts XIX, XXI, and XXII, and XXIV (Tr 1625).

The basic nature of the remaining charges against the Petitioner are that, knowing them to be false, fictitious or

fraudulent, he caused four claims for payment of money under the Social Welfare Act to be made or presented. It is charged that the claims represented that a "direct, diagnostic laryngoscopy" had been performed for certain patients when in truth that service had not been performed for those patients. The basic nature of the evidence was as follows.

To participate in the Medicaid Program, a doctor makes a request to enroll (Tr 679) by submitting a form, like Exhibit 10, which is the Provider Enrollment Agreement submitted by the Petitioner (Tr 549-550, 1208 and 1588-1589). The practice of the Department of Social Services is to send each doctor a policy manual (Exhibit No. 1) and a procedure code manual (Exhibit No. 2) at the time of enrollment (Tr 679). A doctor takes care of a Medicaid recipient, then Medicaid is billed for the services performed on claims forms furnished by Medicaid (Exhibit Nos. 16-36). When a claims form is received, it is processed by a computer (Tr 680), so code numbers are used to describe who the patient is, what the doctor's diagnosis is and what treatment procedure was performed (Tr 681-683).

The policy manual (Exhibit No. 1) describes the basic standards of the program and how to bill (Tr 677-678 and 706-707) and there is additional information in the coding manual (Exhibit No. 2) about how to use procedure codes in describing the medical services performed for a patient (Tr 678 and 707). The procedure code manual was available and used at the offices where the Petitioner worked (Tr 1202).

It was stipulated that the Petitioner enrolled in the Medicaid Program (Tr 1588-1589), and the testimony indicates that the clinic's practice for billing Medicaid was as follows. When a Medicaid patient came in, a copy of his or her Medicaid card was made and the patient was asked to sign a billing sheet (Tr 1200). In addition, there were medical records

kept on each patient, which were completed by either a physician's assistant or a doctor, whoever saw the patient (Tr 1200). Whenever a physician's assistant saw a patient, the supervising doctor would review the chart and initial it (Tr 1200).

When a patient was seen, the billing sheet and patient chart were taken into the examining room and completed (Tr 1061 and 1268). The same information about treatment was written on both forms (Tr 1067-1068). Afterwards they were separated. The billing form was processed and the patient chart was reviewed, initialled and filed until the next visit by the patient (Tr 1068 and 1269).

Medicaid claims forms were prepared from the internal billing sheets (Tr 1269-1271); however, the medical charts were also used to complete those claims forms (Tr 1201).

As a review of Exhibit Nos. 16-36 shows, each claims form has space for billing up to four different procedures (Tr 682). This appeal involves four claims forms. The Petitioner was found guilty on Count Nos. XVIII, XX, XXIII, and XXV (Tr 1625). The claims forms pertinent to those counts are in Exhibit No. 36 for Count XVIII, in Exhibit No. 34 for Count XX, and in Exhibit No. 32 for Counts XXIII and XXV.

The claims forms in question are not in question for all the procedures billed on them. What was in question are billings for what the claims forms describe as "laryngoscopy" followed by the procedure code number "2140". That procedure code number comes from page 98 of Exhibit No. 2, which was enlarged for demonstrative purposes as Exhibit No. 3 (Tr 678). The definition for Code No. 2140 in those exhibits is:

"Laryngoscopy, direct, diagnostic"

and that code is found in the section of Exhibit No. 2 which deals with the surgical procedures (Tr 686).

Literally, the word "laryngoscopy" means that a person's larynx (voicebox) was examined, but in the practice of medicine the usual practice is to describe the process by which such an examination is done (Tr 573). This is done by using the description "direct" or "indirect," (Tr 573) and without such a description the word laryngoscopy has no medical meaning (Tr 693).

A direct laryngoscopy is a surgical procedure (Tr 581) usually taught in medical school during a surgery rotation at a hospital (Tr 583-584 and 676). An indirect laryngoscopy is an office procedure which is a part of an office visit and is not separately billed (Tr 580 and 628).

The Petitioner's Medicaid Provider Agreement (Exhibit No. 10) indicates he is an M.D. licensed to practice in Michigan, and that is supported by the testimony about his role as supervising physician (Tr 962, 1049 and 1198-1199).

The laryngoscopies allegedly performed in connection with the billings in question were done by use of Exhibit No. 5A (Tr 969-970, 1009, 1052 and 1060). However, use of such an instrument is an indirect laryngoscopy (Tr 574-575 and 1052-1053). The Petitioner showed the instrument (Exhibit No. 5A) to the physician's assistants and gave instructions in its use (Tr 969 and 1052).

With regard to Count XVIII, although the physician's assistant testified that a laryngoscopy was performed using Exhibit 5A (Tr 992-993), the patient Sheila Jones testified that she was never examined with Exhibit No. 5A (Tr 1079-1080).

With regard to Count XX, the physician's assistant said she performed a laryngoscopy with Exhibit No. 5A (Tr 998),

and the patient Shirley Williams recalled being examined some times with Exhibit No. 5A (Tr 882).

With regard to Count XXII, the physician's assistant testified she performed a laryngoscopy using Exhibit No. 5A (Tr 1001-1002). The patient Edna Coleman testified she was not examined by the use of Exhibit No. 5A everytime, but her throat had been examined that way (Tr 897-898). Similar testimony was given by the physician's assistant in regard to Count XXV (Tr 1003) and that count also involves Mrs. Coleman.

SUMMARY OF ARGUMENT

The first question presented by the Petitioner does not truly raise a federal question. As Petitioner's argument shows, the real issue is whether the Michigan courts correctly interpreted the Michigan statute. Furthermore, for the reasons set forth hereinafter, there is a sound basis for the construction adopted in the jury instructions.

The second question presented by the Petitioner merits no further review by the court. The trial court carefully adopted the proper standard for reviewing the sufficiency of the evidence, and viewed in the light favorable to the prosecution, a rational trier of fact could have found that the claims in question were false, fictitious or fraudulent.

ARGUMENT

I.

WHERE THE JURY WAS FULLY AND PROPERLY INSTRUCTED ON THE MENTAL ELEMENTS OF THE OFFENSE UNDER MICHIGAN LAW, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT DECLINED TO GIVE AN INSTRUCTION ON SPECIFIC INTENT TO DECEIVE.

"Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] and an evil-doing hand . . .'" *United States* v *Bailey*, 444 US 394, 402 (1980) (citation omitted). However, vicarious criminal liability can be imposed even though a defendant did no personal act. *People* v *DeClerk*, 400 Mich 10, 20-23; 252 NW2d 782 (1977). Likewise, the legislature can eliminate any *mens rea* requirement and impose "strict liability." *People* v *Roby*, 52 Mich 577, 579; 18 NW 365 (1884); *People* v *Sybisloo*, 216 Mich 1, 5; 184 NW 410 (1921); *People* v *Thompson*, 259 Mich 109, 119-121; 242 NW 857 (1932). Furthermore, it appears that "a statute can create both strict liability and vicarious liability." *People* v *DeClerk, supra*, at 22, n. 7.

The question raised by the Petitioner concerns what type of *mens rea* must be proved under the statute involved in this case. This Court has said:

> "Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.
>
> "• • •
>
> "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This

venerable distinction, however, has been the source of a good deal of confusion.

"• • •

"This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of mens rea.

"• • •

"As we pointed out in *United States* v *United States Gypsum Co*, 438 US 422, 445 (1978), a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct[.]' while he is said to act knowingly if he is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'

"• • •

"In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States* v *Bailey, supra*, at 403-405.

The trial judge read the statute under which the Petitioner was charged to the jury (Tr 1559), he defined the four elements of the crime, repeating them twice (Tr 1559-1561), he clarified the meaning of the first three elements (Tr 1561-1563), he repeated the four elements (Tr 1564) and then he turned to defining the knowledge element (Tr 1564-1565):

"What about the word 'knowing?' Remember that one of the elements concerns the matter of knowing. You must be convinced beyond a reasonable doubt that, when

the Defendant caused a claim to be made or presented, he or she—he or it had knowledge that it was false, fictitious or fraudulent. Knowledge is an important element of this crime and knowledge not only means actual knowledge, but also it means constructive knowledge gained through notice of facts and circumstances from which guilty knowledge may be inferred.

"One may not deliberately close his, her or its eyes to what otherwise would have been obvious to him, her or it; however, an act is not done knowingly if it is done by mistake, by carelessness, with an honest belief that the claim was true or for other innocent reasons.

"The statute, the law that I have earlier made reference to, defines the word 'knowing' as follows: Knowing and knowingly means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result."

The Michigan Court of Appeals affirmed the giving of that instruction, noting that it satisfies the requirement of the statute (Appendix 12a-14a). Another panel has made a similar type of analysis of MCL 400.607. *In re Wayne County Prosecutor*, 121 Mich App 798; 329 NW2d 510 (1982).

Although the Petitioner argues here and argued below that said ruling violates the Fourteenth Amendment, that argument is incorrect. The Fourteenth Amendment does not require a state to include the intent to deceive in a statute penalizing the presentation or making of a false Medicaid claim. *Cf. Patterson* v *New York*, 432 US 197 (1977).

Assuming, without conceding, that the Michigan courts have misconstrued their own statute, such decisions are not a denial of the due process guaranteed by the Fourteenth Amendment. *Neblett* v *Carpenter*, 305 US 297, 302 (1938).

Petitioner argues that MCL 400.607 is "quintessentially the same as 18 USC 1001." Assuming for the sake of argument that that is a correct argument, under 18 USC 1001 instructions similar to the one given in this case have been approved. *United States* v *Evans*, 559 F2d 244, 246 (CA5, 1977) *cert den* 434 US 1015 (1978); and *United States* v *Schaffer*, 600 F2d 1120, 1122 (CA5, 1979).

On the other hand, 18 USC 1001 contains the term "willfully", which is not in MCL 400.607. That difference supports a conclusion that specific intent is not part of the *mens rea* requirement of MCL 400.607. *See, United States* v *Cook*, 586 F2d 572, 574-575 (CA5, 1978).

MCL 400.607 is most nearly equivalent to 18 USC 287, and under 18 USC 287 instructions similar to the one in this case have been upheld. *United States* v *Hanlon*, 548 F2d 1096, 1101 (CA2, 1977); and *United States* v *Precision Medical Laboratories, Inc*, 593 F2d 434, 443-444 (CA2, 1978).

The foregoing authorities demonstrate that the Petitioner was not deprived of his right to due process of law by the jury instruction concerning knowledge.

II.

THE MICHIGAN COURTS CORRECTLY RULED THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT A JURY VERDICT.

Prior to the decision in *Jackson* v *Virginia*, 443 US 307 (1979), the Michigan standard for determining the sufficiency of evidence was disputed. In light of *Jackson*, the Michigan Supreme Court ruled:

"[T]he trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, • • • view that evidence in a light most favorable to the prosecution, • • • and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, . . ." *People* v *Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (citations omitted).

In this case, the trial court denied all Defendants' motions for a directed verdict, citing both of the previously applied standards (Tr 1320-1321). The prosecution then directed the Court's attention to *Hampton* (Tr 1322). The judge considered that decision and under its standards reaffirmed his decision to deny a directed verdict (Tr 1323-1325). Thus, it is clear the trial court was applying the proper, legal standard in deciding the motions.

The four elements of the crime as charged under MCL 400.607; MSA 16.614(7) in the trial court are:

1. a claim must have been made or presented to an employee or officer of the State under the Social Welfare Act;

2. that claim must have been false, fictitious or fraudulent;

3. the Defendant must have made or presented the claim or the Defendant must have caused the claim to be made or presented; and

4. the Defendant must have acted knowing the claim was false, factitious or fraudulent.

Although this interpretation of MCL 400.607 was challenged in other arguments of the Petitioner's Brief in the Michigan Supreme Court, it was accepted for purposes of the present issue (Brief, pp 17-18). The Court of Appeals reformulated the elements of the crime as:

> ". . . 1) a person makes, presents, or causes to be made or presented, 2) to an employee or officer of the state, 3) a claim under the Social Welfare Act, 4) knowing the claim to be false, fictitious or fraudulent." (Appendix 9a)

What the Petitioner challenges is the correctness of the trial judge's decision that there was evidence from which a rational trier of fact could find that the claims presented were false, fictitious or fraudulent.

What Petitioner appears to ignore is a most important requirement set forth in *Jackson* v *Virginia, supra,* and *People* v *Hampton, supra.* The evidence must be viewed in the light most favorable to the prosecution in deciding whether a directed verdict is proper.

The claims in question, as indicated in the Statement of the Case, are found in Exhibit No. 36 (Count XVIII), Exhibit No. 34 (Count XX) and Exhibit No. 32 (Counts XXIII and XXV). Those claims describe the service performed as "laryngoscopy"; however, as the prosecution's experts indicated, that description is incomplete (Tr 573 and 693). But, that was not the only description used; the claims forms also have the procedure code "2140" typed in the appropriate space. Since code numbers are used in computer processing (Tr 680-683), the code number is of clearly more significance. Pages 1-4 of Chapter IV (the billing chapter) of the Practitioner Manual (Exhibit No. 1) indicates this, and Petitioner had notice of that fact by being sent that manual (Tr 679). In any

event, use of the code "2140" clearly modifies or describes the word laryngoscopy, which should not be taken out of its context on the claims forms.

There is no doubt that the code "2140" comes from page 98 of Exhibit No. 2 (enlarged as Exhibit No. 3), and that page defines Code 2140 as: "laryngoscopy, direct, diagnostic." Whether the adjectives "direct, diagnostic" are put before the noun (as the Information in this case does) or after the noun (as the manual does), those adjectives have the same purpose, to modify and describe the noun "laryngoscopy," which is the standard medical practice (Tr 573 and 693).

In other words the claims in question, viewed in the light favorable to the prosecution, represent that direct, diagnostic laryngoscopies were performed for the patients identified. The uncontradicted evidence shows that, at best, only an indirect laryngoscopy was performed (compare Tr 969-970, 1009, 1052 and 1060 with Tr 574-575 and 1052-1053), and with regard to Count XVIII, the patient testified that the type of laryngoscopy allegedly performed on her (Tr 992-993) was not performed (Tr 1079-1080). Thus, the evidence was sufficient to allow a rational finder of fact to conclude that there was a false, fictitious or fraudulent representation in the claims.

The notation "laryngoscopy" on the patient charts and claims forms and the medical examination conducted by using Exhibit No. 5A could be considered (as the jury apparently did) as nothing more than a deception to give an appearance of propriety to the claims. *See, United States* v *Hooker*, 541 F2d 300, 305 (CA5, 1976).

The Information alleges that the claims represent the performance of a direct, diagnostic laryngoscopy, but that that procedure was not performed. Under that allegation, the only evidence needed to show falsity is proof that a direct laryngos-

copy was not performed. Such proof could have been adduced in at least three ways: (1) it could be shown that the patient was not seen at all; (2) it could be shown that the patient's larynx was not examined, or (3) it could be shown that only an indirect laryngoscopy was performed. With regard to the convictions of the Petitioner, the proofs were of the second and third types on Count XVIII, while they were of the third type as to Counts XX, XXIII and XXV.

The prosecution's theory of falsity submitted by the judge to the jury upon written request (Tr 1569) was consistent with both the Information and the evidence.

The Petitioner also refers to 18 USC 1001 and cases decided thereunder as reasons to reverse the trial court's denial of a directed verdict, but some of those cases are completely distinguishable because they deal with aspects of perjury that are unique to that crime. The basic theme of those cases is that the criminal statutes in those cases do not punish innocent errors or differences of opinion.

There are three basic answers to this argument. First, in this case, the jury instructions recognized the defense of mistake when the trial court instructed the jury:

> ". . . an act is not done knowingly if it is done by mistake, by carelessness, with an honest belief that the claim was true or for other innocent reasons." (Tr 1565)

Whether the acts of the Petitioner were "knowing" or "mistake" was for the jury. Second, this case does not involve negative implications like the perjury cases cited by Petitioner do. It is based upon the description "laryngoscopy" followed by the use of the code "2140," which are affirmative representations. Third, the cases cited do not apply to this case because of the different statutory language. A false claims statute

should not be so strictly construed that it is effectively nullified. *United States* v *Bramblett*, 348 US 503, 510 (1955). The purpose of a motion for a directed verdict is to protect defendants from irrational juries. *People* v *Hampton, supra,* at 367. In this case, viewed favorably, the evidence was sufficient to allow a rational finder of fact to find beyond a reasonable doubt that the claims were false, fictitious or fraudulent. *See United States* v *Cook, supra.*

With regard to the knowledge element, the evidence shows the Petitioner is an M.D. licensed in Michigan (Exhibit No. 10), that doctors do not use the word laryngoscopy without modifying it to describe the manner of performance (direct or indirect) (Tr 573 and 693), that the Petitioner saw patients personally (Tr 1053), that the office practice was for the treating physician or physician's assistant to complete both the billing form and patient chart the same way (Tr 1067-1068), that only the word laryngoscopy was used on those forms (Exhibit Nos. 56, 58 and 60) and that as a medical practice indirect laryngoscopies are not usually separately identified and billed (Tr 580 and 628). Also, the amount billed was about half the total amount of the claims (Exhibit Nos. 36, 34 and 32).

Viewed favorably to the prosecution, this evidence supports a conclusion that the Petitioner had knowledge that he was causing false claims for direct laryngoscopies to be submitted. The *mens rea* requirement of a crime should not be construed in a way that makes the defendant conviction-proof. *People* v *Vinokurow*, 322 Mich 26, 30-31; 33 NW2d 647 (1948).

The Petitioner argues that he was deprived of his right to due process of law because the claims forms in question were literally true. As the foregoing references to the record demonstrate, those forms read as a whole and in the Medicaid billing context were not literally true. The jury correctly found that they were false claims.

CONCLUSION AND RELIEF SOUGHT

The Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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